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14 MACYS.COM, INC.

15 **UNITED STATES DISTRICT COURT**
16 **NORTHERN DISTRICT OF CALIFORNIA**
17 **SAN FRANCISCO DIVISION**

18 MACY'S, INC. and MACYS.COM, INC.,

19 Plaintiffs,

20 v.

21 STRATEGIC MARKS, LLC,

22 Defendant.

23 AND RELATED COUNTERCLAIMS
24
25
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27
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Case No. CV 11-6198 SC

STIPULATED PROTECTIVE ORDER

1 **1. PURPOSES AND LIMITATIONS**

2 Disclosure and discovery activity in this action are likely to involve production of
3 confidential, proprietary, or private information for which special protection from public
4 disclosure and from use for any purpose other than prosecuting this litigation may be
5 warranted. Accordingly, the parties hereby stipulate to and petition the Court to enter the
6 following Stipulated Protective Order ("Stipulated Order"). The parties acknowledge that
7 this Stipulated Order does not confer blanket protections on all disclosures or responses
8 to discovery and that the protection it affords from public disclosure and use extends only
9 to the limited information or items that are entitled to confidential treatment under the
10 applicable legal principles. The parties further acknowledge, as set forth in Section 12.3,
11 below, that this Stipulated Order does not entitle them to file confidential information
12 under seal; Civil Local Rule 79-5 and General Order 62 set forth the procedures that
13 must be followed and the standards that will be applied when a party seeks permission
14 from the Court to file material under seal. The parties further acknowledge that the
15 protections afforded by this Stipulated Order apply to Protected Material properly
16 designated as so by either party prior to the parties entering into this Stipulated Order.

17 **2. DEFINITIONS**

18 2.1 **Challenging Party:** a Party or Non-Party that challenges the designation of
19 information or items under this Stipulated Order.

20 2.2 **"CONFIDENTIAL" Information or Items:** Disclosure or Discovery Material
21 (regardless of how it is generated, stored, maintained, or produced) and/or tangible
22 things qualify for protection as "CONFIDENTIAL" Information or Items if their disclosure
23 to the public would violate a personal, financial, or other interest protected by law (such
24 as a trade secret or other confidential research, development, or proprietary commercial
25 information) or such Disclosure or Discovery Material and/or tangible things otherwise
26 qualify for protection under Federal Rule of Civil Procedure 26(c).

27 2.3 **Counsel:** Outside Counsel and/or House Counsel (as well as their
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1 associated attorneys and support staff).

2 2.4 **Designated House Counsel:** House Counsel who seek access to
3 “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” information in this matter.

4 2.5 **Designating Party:** a Party or Non-Party that designates information or
5 items that it produces in disclosures or in responses to discovery as either
6 “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY”
7 Information or Items.

8 2.6 **Disclosure or Discovery Material:** all items, testimony or information,
9 regardless of the medium or manner in which it is generated, stored, maintained or
10 produced (including, among other things, testimony, transcripts, videotaped depositions,
11 video cassettes , or other digital media upon which the recorded deposition has been
12 stored, and tangible things), that are produced or generated in disclosures or responses
13 to discovery sought (in writing and/or during a deposition) in this matter.

14 2.7 **Expert:** a person with specialized knowledge or experience in a matter
15 pertinent to the litigation who has been retained by a Party or its Counsel to serve as an
16 expert witness or as a consultant in this action.

17 2.8 **“HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” Information or**
18 **Items:** extremely sensitive “CONFIDENTIAL” Information or Items, disclosure of which to
19 another Party or Non-Party would create a substantial risk of serious harm that could not
20 be avoided by less restrictive means.

21 2.9 **House Counsel:** attorneys who are employees of a party to this action.
22 House Counsel does not include Outside Counsel.

23 2.10 **Non-Party:** any natural person, partnership, corporation, association, or
24 other legal entity not named as a Party to this action.

25 2.11 **Outside Counsel:** attorneys who are not employees of a party to this
26 action, but are retained to represent or advise a party to this action in connection with this
27 action, or are affiliated with a law firm which has appeared on behalf of that party in this
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1 action.

2 2.12 **Party:** any party to this action, including all of its officers, directors,
3 employees, consultants, retained experts, and Outside Counsel (and their support staffs).

4 2.13 **Producing Party:** a Party or Non-Party that testifies or provides Disclosure
5 or Discovery Material to (or makes such material available for inspection to) a Receiving
6 Party in connection with this action.

7 2.14 **Professional Vendors:** persons or entities that provide litigation support
8 services (e.g., photocopying, court reporting, stenographic reporting, videotaping,
9 translating, preparing exhibits or demonstrations, and organizing, copying, imaging,
10 coding, converting, storing or retrieving data, documents or information, or designing
11 programs for handling data connected with this litigation in any form or medium), and
12 their employees and subcontractors.

13 2.15 **Protected Material:** any Disclosure or Discovery Material that is
14 designated by a Designating Party as "CONFIDENTIAL" or "**HIGHLY CONFIDENTIAL –**
15 **ATTORNEYS' EYES ONLY**" Information or Items (or deemed to be so pursuant to the
16 terms of this Stipulated Protective Order).

17 2.16 **Receiving Party:** a Party that receives Disclosure or Discovery Material
18 from a Producing Party.

19 **3. SCOPE**

20 The protections conferred by this Stipulation and Order cover not only Protected
21 Material (as defined above), but also the following material which is hereby deemed to
22 constitute Protected Material under this Stipulated Order: (1) any information copied or
23 extracted from Protected Material by (or at the behest) of someone other than the
24 Designating Party for that Protected Material; (2) all copies, excerpts, summaries, or
25 compilations of Protected Material made by (or at the behest) of someone other than the
26 Designating Party for that Protected Material; and (3) any testimony, conversations, or
27 presentations by Parties or their Counsel that might reveal Protected Material.
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1 However, the protections conferred by this Stipulated Order do not cover
2 information: (i) lawfully acquired by the Receiving Party (by means other than discovery
3 in this litigation) prior to its disclosure by the Designating Party in a manner that did not
4 impose any obligation of confidentiality upon the Receiving Party; (ii) lawfully acquired by
5 the Receiving Party from a third party who obtained the information lawfully, was under
6 no obligation of confidentiality to the Designating Party when it provided the information
7 to the Receiving Party, and failed to impose any conditions of confidentiality upon the
8 Receiving Party; (iii) was in the public domain when it was disclosed by the Designating
9 Party to the Receiving Party; (iv) entered the public domain (after its disclosure by the
10 Designating Party to the Receiving Party) as a result of a publication not involving a
11 violation of this Stipulated Order, including becoming part of the public record through
12 trial or otherwise. The Parties shall confer in good faith prior to trial in an attempt to
13 devise any necessary additional and/or alternate protective procedures to be applicable
14 at trial that are satisfactory to the Court.

15 This Stipulated Order has no effect upon, and its scope shall not extend to, any
16 Party's use or disclosure of its own "CONFIDENTIAL" Information or Items.

17 Protected Material that has been produced by a Designating Party prior to the
18 parties execution of this Stipulated Order shall be afforded the full protections conferred
19 by this Stipulated Order.

20 **4. DURATION**

21 Even after final disposition of this litigation, the confidentiality obligations imposed
22 by this Stipulated Order shall remain in effect until a Designating Party agrees otherwise
23 in writing or a court order otherwise directs. Final disposition shall be deemed to be the
24 later of (1) dismissal of all claims and defenses in this action, with or without prejudice;
25 and (2) final judgment herein after the completion and exhaustion of all appeals,
26 rehearings, remands, trials, or reviews of this action, including the time limits for filing any
27 motions or applications for extension of time pursuant to applicable law.
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1 **5. DESIGNATING PROTECTED MATERIAL**

2 **5.1 Exercise of Restraint and Care in Designating Material for Protection.**

3 Each Party or Non-Party that designates information or items for protection under
 4 this Stipulated Order shall make a good faith effort to limit any such designation only to
 5 material that qualifies for protection hereunder (according to the standards set forth in
 6 paragraphs 2.2 and 2.8 of this Stipulated Order). Where practicable, a Designating Party
 7 shall designate for protection only the qualifying portions of material, documents, items,
 8 or oral or written communications, leaving non-qualifying material, documents, items, and
 9 oral or written communications undesignated.

10 Mass and/or indiscriminate designations are prohibited. The designation of any
 11 information or items as "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL - ATTORNEYS'
 12 EYES ONLY" Information or Items pursuant to terms of this Stipulated Order shall
 13 constitute the verification by Counsel of record for the Producing Party that at least one
 14 attorney has reviewed the material being designated and that the designation is, in the
 15 good faith judgment of the Producing Party's Counsel, consistent with the terms of this
 16 Stipulated Order. Designations that are shown to be clearly unjustified, or to have been
 17 made for an improper purpose (e.g., to unnecessarily encumber or retard the case
 18 development process or to impose unnecessary expenses and burdens on other parties),
 19 expose the Designating Party to sanctions.

20 If it comes to a Designating Party's attention that information or items that it
 21 designated for protection do not qualify for protection at all or do not qualify for the level
 22 of protection initially asserted, that Designating Party shall promptly notify all other parties
 23 that it is withdrawing the mistaken designation.

24 **5.2 Manner and Timing of Designations.**

25 Except as otherwise provided in this Stipulated Order (see, e.g., second paragraph
 26 of section 5.2(a) below), or as otherwise stipulated or ordered, Disclosure or Discovery
 27 Material that qualifies for protection under this Stipulated Order must be clearly
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1 designated as such before the material is disclosed or produced.

2 Designation in conformity with this Stipulated Order requires:

3 (a) for information in documentary form (e.g., paper or electronic
4 documents, but excluding transcripts of depositions or other pretrial or trial proceedings),
5 that the Producing Party affix the legend “CONFIDENTIAL” or “HIGHLY CONFIDENTIAL
6 – ATTORNEYS’ EYES ONLY” to each page that contains Protected Material. If only a
7 portion of the material appearing on such a page qualifies for protection hereunder, the
8 Producing Party must *also* clearly identify the protected portion(s) (e.g., by making
9 appropriate markings in the margins) and must specify, for each portion thus identified,
10 the level of protection being asserted for the referenced material.

11 A Party or Non-Party that makes original documents or materials available for
12 inspection need not designate any portions thereof for protection until after the inspecting
13 Party has indicated which documents or material it would like copied and produced.
14 During the inspection and before the designation, all of the material made available for
15 inspection shall be temporarily deemed “HIGHLY CONFIDENTIAL – ATTORNEYS’
16 EYES ONLY.” After the inspecting Party has identified the documents it wants copied
17 and/or produced, the Producing Party shall be provided with a reasonable opportunity
18 (prior to copying and/or production of the requested documents) to determine which of
19 the requested documents, or portions thereof, qualify for protection under this Stipulated
20 Order, and to designate its Protected Material as such.

21 (b) for testimony given in deposition or in other pretrial or trial proceedings,
22 that the Designating Party identify on the record all protected testimony and specify the
23 level of protection being asserted before the close of the deposition, hearing, or other
24 proceeding. If a Party has reasons for believing it may be (or has been) impractical to
25 comply fully with this requirement, and/or it appears that substantial portions of the
26 testimony may qualify for protection, the Designating Party may invoke on the record
27 prior to the conclusion of the deposition, hearing, or other proceeding, a right to have up
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1 to 21 days following the deposition (the "21-Day Review Period"), hearing, or other
2 proceeding to identify the specific portions of the testimony as to which protection is
3 sought and to specify the level of protection being asserted. Following expiration of such
4 21-Day Review Period, only those portions of the testimony that are appropriately
5 designated for protection within that 21-Day Review Period shall be covered by the
6 provisions of this Stipulated Order.

7 Alternatively, when there is good cause to do so, a Designating Party may
8 specify, during the deposition or up to 21 days afterwards (if that period is properly
9 invoked during the deposition), that the **entire** transcript shall be treated as
10 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY."

11 Parties shall give the other parties reasonable notice if they reasonably
12 expect a deposition, hearing or other proceeding to include Protected Material so that the
13 other parties can ensure that only authorized individuals who have signed the
14 "Acknowledgment and Agreement to Be Bound" (Exhibit A) are present at those
15 proceedings. Nonetheless, if Protected Material is about to be (or at risk of being)
16 disclosed during a deposition, then prior to disclosure of the Protected Material, any
17 person not authorized to receive the Protected Material pursuant to paragraph 7.2 or
18 paragraph 7.3 below shall be excluded from the deposition until testimony regarding
19 those matters has been concluded. The use of a document as an exhibit at a deposition
20 shall not in any way affect its designation as "CONFIDENTIAL" or "HIGHLY
21 CONFIDENTIAL – ATTORNEYS' EYES ONLY."

22 Transcripts containing Protected Material shall have an obvious legend on
23 the title page that the transcript contains Protected Material, and the title page shall be
24 followed by a list of all pages (including line numbers as appropriate) that have been
25 designated as Protected Material and the level of protection being asserted by the
26 Designating Party. Additionally, each page of the transcript containing Protected Material
27 shall be individually marked as containing Protected Material, including the level of
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1 protection being asserted by the Designating Party for such Protected Material. The
 2 Designating Party shall inform the court reporter of these requirements. Any transcript
 3 that is prepared before the expiration of a 21-Day Review Period shall be treated by all
 4 parties during that period as if it had been designated "HIGHLY CONFIDENTIAL –
 5 ATTORNEYS' EYES ONLY" in its entirety unless otherwise agreed. After the expiration
 6 of that period, the transcript shall be treated as Protected Material only if, and as, actually
 7 designated.

8 (c) for information produced in some form other than documentary and for
 9 any other tangible items, that the Producing Party affix in a prominent place on the
 10 exterior of the container or containers in which the information or item is stored (and to
 11 the extent possible, on the information or item itself) the legend "CONFIDENTIAL" or
 12 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." If only a portion or portions of
 13 the information or item warrant protection, the Producing Party, to the extent practicable,
 14 shall identify the protected portion(s) and specify the level of protection being asserted.

15 A 21-Day Review Period shall automatically commence upon the Parties' final
 16 execution of this Stipulated Order during which the Parties may (i) identify specific
 17 portions of deposition testimony taken previously in this action for which protection under
 18 this Stipulated Order is sought and (ii) specify the level of protection being asserted under
 19 this Stipulated Order. Following expiration of this automatic 21-Day Review Period, only
 20 those portions of the previous deposition testimony that are appropriately designated for
 21 protection within the automatic 21-Day Review Period shall be covered by the provisions
 22 of this Stipulated Order.

23 5.3 Inadvertent Failures to Designate.

24 To the extent that material which should have been designated as
 25 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" is
 26 inadvertently produced without such designation, the Producing Party shall provide
 27 written notice of the material that was inadvertently produced, the designation that is
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1 applicable to the material, and the date of discovery of the inadvertent production to the
2 Receiving Party immediately following discovery of the inadvertent production. Following
3 receipt of notice of a designation applied pursuant to this paragraph, the Receiving Party
4 must make reasonable efforts to assure that the newly designated material is treated in
5 accordance with the provisions of this Stipulated Order.

6 **6. CHALLENGING CONFIDENTIALITY DESIGNATIONS**

7 **6.1 Grounds and Timing for Challenges.**

8 Any Party or Non-Party may challenge a designation of confidentiality at any time
9 for failure to meet the qualifications set forth in paragraphs 2.2, 2.8, 5.1, and/or 5.2 of
10 this Stipulated Order, for unreasonable delay in designating material pursuant to
11 paragraph 5.3 of this Stipulated Order, or because the designation exceeds the
12 limitations (which are set forth in paragraph 3 of this Stipulated Order) on protections
13 offered hereunder. Unless a prompt challenge to a Designating Party's confidentiality
14 designation is necessary to avoid foreseeable, substantial unfairness, unnecessary
15 economic burdens, or a significant disruption or delay of the litigation, a Party does not
16 waive its right to challenge a confidentiality designation by failing to mount a challenge
17 promptly after the original designation is made.

18 **6.2 Meet and Confer.**

19 The Challenging Party shall initiate a dispute resolution process by serving (by
20 hand delivery, U.S. Mail or e-mail) written notice of each designation it is challenging and
21 describing the basis for each challenge (the "Notice"). To avoid ambiguity as to whether a
22 challenge has been made, the Notice must recite that the challenge to confidentiality is
23 being made in accordance with this specific paragraph of the Stipulated Order. The
24 parties shall attempt to resolve each challenge in good faith, and must begin the process
25 by conferring directly with each other in person or telephonically (other forms of
26 communication are not sufficient) within 14 days after the date upon which the Notice
27 was hand delivered, mailed, or e-mailed. In conferring, the Challenging Party must
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1 explain the basis for its belief that the confidentiality designation was not proper and must
 2 give the Designating Party an opportunity to review the designated material, to reconsider
 3 the circumstances, and, if no change in designation is offered, to explain the basis for the
 4 chosen designation. A Challenging Party may proceed to the next stage of the challenge
 5 process only after engaging in this meet and confer process or establishing that the
 6 Designating Party is unwilling to participate in the meet and confer process in a timely
 7 manner.

8 6.3 **Judicial Intervention.**

9 If the Parties cannot resolve a challenge without court intervention, the
 10 Challenging Party shall file and serve a motion challenging a confidential designation
 11 under Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5 and General Order
 12 62, if applicable) within 21 days after the initial Notice of challenge, or within 14 days after
 13 the parties agree that the meet and confer process will not resolve their dispute,
 14 whichever is earlier. Each such motion must be accompanied by a competent
 15 declaration affirming that the movant has complied with the meet and confer
 16 requirements imposed in the preceding paragraph.

17 The burden of persuasion in any such challenge proceeding shall be on the
 18 Designating Party. Frivolous challenges and those made for an improper purpose (e.g.,
 19 to harass or impose unnecessary expenses and burdens on other parties) may expose
 20 the Challenging Party to sanctions. All parties shall continue to afford the material in
 21 question the level of protection to which it is entitled under the Producing Party's
 22 designation until the court rules on the challenge.

23 **7. ACCESS TO AND USE OF PROTECTED MATERIAL**

24 7.1 **Basic Principles.**

25 A Receiving Party may use Protected Material that is disclosed or produced by
 26 another Party or by a Non-Party in connection with this case only for prosecuting,
 27 defending, or attempting to settle this litigation. Such Protected Material may be disclosed
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1 only to the categories of persons and under the conditions described in this Stipulated
 2 Order. When the litigation has been terminated, a Receiving Party must comply with the
 3 provisions of Section 13 below.

4 Protected Material must be stored and maintained by a Receiving Party at a
 5 location and in a secure manner that ensures that access is limited to the persons
 6 authorized under this Stipulated Order.

7 **7.2 Disclosure of "CONFIDENTIAL" Information or Items.**

8 Unless otherwise ordered by the Court or permitted in writing by the Designating
 9 Party, a Receiving Party may disclose any information or item designated
 10 "CONFIDENTIAL" only to:

- 11 (a) the Court and its personnel;
- 12 (b) any alternative dispute resolution personnel engaged in the above
 13 captioned proceedings to whom it is reasonably necessary to disclose the information for
 14 this litigation who has been provided with a copy of this Stipulated Order and thereafter
 15 signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A);
- 16 (c) the Receiving Party's Outside Counsel in this action if said Outside
 17 Counsel executed this Stipulated Order, and any other Outside Counsel (or employee
 18 thereof) to whom it is reasonably necessary to disclose the information for this litigation
 19 who has either (i) been provided with a copy of this Stipulated Order and thereafter
 20 signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A), or (ii) personally
 21 signed some other confidentiality agreement (enforceable by the law firm with which the
 22 Receiving Party's Outside Counsel who executed this Stipulated Order was associated at
 23 the time) which obligates said Outside Counsel (or employee thereof) to protect such
 24 information or Items in a manner consistent with, or exceeding, the applicable standards
 25 set forth herein;
- 26 (d) any managing agent, officer, or director, or House Counsel to whom
 27 disclosure is reasonably necessary for this litigation, or any other employee of the
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1 Receiving Party who is supervising the Receiving Party's Outside Counsel or House
2 Counsel in connection with this litigation (or to whom Outside or House Counsel for the
3 Receiving Party otherwise reports in connection with this litigation);

4 (e) any Party's insurers, if any, to whom disclosure is reasonably
5 necessary in connection with this litigation, or their Counsel who has been provided with
6 a copy of this Stipulated Order and thereafter signed the "Acknowledgment and
7 Agreement to Be Bound" (Exhibit A).

8 (f) the author or recipient of a document containing the information or a
9 custodian or other person who otherwise possessed, knew or had authorized access to
10 the information;

11 (g) any Professional Vendor(s) (together with their associates,
12 consultants, and clerical and secretarial staff) to whom disclosure is reasonably
13 necessary for this litigation so long as said Professional Vendors have either (i) been
14 provided with a copy of this Stipulated Order and thereafter signed the "Acknowledgment
15 and Agreement to Be Bound" (Exhibit A), or (ii) signed some other confidentiality
16 agreement enforceable by the Receiving Party (or its agent(s)) which obligates the
17 Professional Vendor(s) to protect the information or items in a manner consistent with, or
18 exceeding, the standards set forth herein;

19 (h) Experts (as defined in this Stipulated Order), professional jury or trial
20 consultants, and any other Non-Party consultants (together with their associates,
21 consultants, and clerical and secretarial staff) of the Receiving Party retained to assist in
22 the prosecution, defense, arbitration, mediation, settlement, or other disposition of this
23 action to whom disclosure is reasonably necessary for this litigation so long as said such
24 Experts, consultants (and associates, consultants, and clerical and secretarial staff
25 thereof) have either (i) been provided with a copy of this Stipulated Order and thereafter
26 signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A), or (ii) signed
27 some other confidentiality agreement enforceable by the Receiving Party (or its agent(s))
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1 which obligates the Experts, consultants (and associates, consultants, and clerical and
2 secretarial staff thereof) to protect the information or items in a manner consistent with, or
3 exceeding, the standards set forth herein;

4 (i) any employee of a Receiving Party not otherwise described herein to
5 whom disclosure is reasonably necessary while preparing for a deposition taken pursuant
6 to FRCP 30(b)(6), so long as such employee has been provided with a copy of this
7 Stipulated Order and thereafter signed the "Acknowledgment and Agreement to Be
8 Bound" (Exhibit A); and

9 (j) during their depositions, any witness in the action not otherwise
10 described herein to whom disclosure is reasonably necessary and who has been
11 provided with a copy of this Stipulated Order and thereafter signed the "Acknowledgment
12 and Agreement to Be Bound" (Exhibit A), unless otherwise agreed by the Designating
13 Party or ordered by the Court;

14 (k) any other person to whom the Designating Party has consented to
15 disclosure in advance and in writing as set forth in paragraph 7.2 who has been provided
16 with a copy of this Stipulated Order and thereafter signed the "Acknowledgment and
17 Agreement to Be Bound" (Exhibit A); and

18 (l) any member of a jury, or alternate thereto, assigned to hear the
19 above-captioned case.

20 (m) The above list of persons to whom "CONFIDENTIAL" Information or
21 Items may be provided may be expanded by mutual agreement of the Parties. Any Party
22 may propose such an expansion by serving a letter on all Outside Counsel specifically
23 identifying (and describing the role and function of) the person(s) proposed to be added
24 to the list ("Expansion Letter"). Person(s) so identified shall be automatically added to
25 the persons listed in paragraph 7.2 unless (within ten (10) business days of service of the
26 Expansion Letter) any Counsel for a Party objects to the Expansion Letter by serving a
27 written objection stating a good faith basis for such an objection. To the extent a Party's
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1 Counsel objects to an Expansion Letter, the proposed expansion is denied, and no
 2 "CONFIDENTIAL" Information or Items produced by the objecting Party may be disclosed
 3 in contravention to such objection unless and until the objecting Party voluntarily retracts
 4 the objection in writing, or the Court so orders.

5 **7.3 Disclosure of "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY"**
 6 **Information or Items.**

7 Unless otherwise ordered by the Court or permitted in writing by the Designating
 8 Party, a Receiving Party may disclose any information or item designated "HIGHLY
 9 CONFIDENTIAL – ATTORNEYS' EYES ONLY" only to:

10 (a) the Court and its personnel;
 11 (b) any alternative dispute resolution personnel engaged in the above
 12 captioned proceedings to whom it is reasonably necessary to disclose the information for
 13 this litigation who has been provided with a copy of this Stipulated Order and thereafter
 14 signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A), and to whom the
 15 procedures set forth in paragraph 7.4(a)(1), below, have been followed;

16 (c) the Receiving Party's Outside Counsel in this action if said Outside
 17 Counsel executed this Stipulated Order, and any other Outside Counsel (or employee
 18 thereof) to whom it is reasonably necessary to disclose the information for this litigation
 19 who has either (i) been provided with a copy of this Stipulated Order and thereafter
 20 signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A), or (ii) personally
 21 signed some other confidentiality agreement (enforceable by the law firm with which the
 22 Receiving Party's Outside Counsel who executed this Stipulated Order was associated at
 23 the time) which obligates said Outside Counsel (or employee) to protect such information
 24 or Items in a manner consistent with, or exceeding, the applicable standards set forth
 25 herein;

26 (d) Designated House Counsel of the Receiving Party (i) to whom
 27 disclosure is reasonably necessary for this litigation, (ii) have been provided with a copy
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1 of this Stipulated Order and thereafter signed the "Acknowledgment and Agreement to Be
2 Bound" (Exhibit A), and (iii) as to whom the procedures set forth in paragraph 7.4(a)(2),
3 below, have been followed;

4 (e) the author or recipient of a document containing the information or a
5 custodian or other person who otherwise possessed, knew or had authorized access to
6 the information;

7 (f) any Professional Vendor(s) (together with their associates,
8 consultants, and clerical and secretarial staff) to whom disclosure is reasonably
9 necessary for this litigation so long as said Professional Vendors have either (i) been
10 provided with a copy of this Stipulated Order and thereafter signed the "Acknowledgment
11 and Agreement to Be Bound" (Exhibit A), or (ii) signed some other confidentiality
12 agreement enforceable by the Receiving Party (or its agent(s)) which obligates the
13 Professional Vendor(s) to protect the information or items in a manner consistent with, or
14 exceeding, the standards set forth herein;

15 (g) Experts (as defined in this Stipulated Order), professional jury or trial
16 consultants, and any other Non-Party consultants (together with their associates,
17 consultants, and clerical and secretarial staff) of the Receiving Party retained to assist in
18 the prosecution, defense, arbitration, mediation, settlement, or other disposition of this
19 action to whom disclosure is reasonably necessary for this litigation so long as said such
20 Experts, consultants (and associates, consultants, and clerical and secretarial staff
21 thereof) have either (i) been provided with a copy of this Stipulated Order and thereafter
22 signed the "Acknowledgment and Agreement to Be Bound" (Exhibit A), or (ii) signed
23 some other confidentiality agreement enforceable by the Receiving Party (or its agent(s))
24 which obligates the Experts, consultants (and associates, consultants, and clerical and
25 secretarial staff thereof) to protect the information or items in a manner consistent with, or
26 exceeding, the standards set forth herein, and to whom the procedures set forth in
27 paragraph 7.4(a)(3), below, have been followed;

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1 (h) any other person to whom the Designating Party has consented to
 2 disclosure in advance and in writing as set forth in paragraph 7.4(a)(4) below who has
 3 been provided with a copy of this Stipulated Order and thereafter signed the
 4 "Acknowledgment and Agreement to Be Bound" (Exhibit A) , and to whom the procedures
 5 set forth in paragraph 7.4(a)(4), below, have been followed; and

6 (i) any member of a jury, or alternate thereto, assigned to hear the
 7 above-captioned case.

8 **7.4 Procedures for Approving or Objecting to Disclosure of "HIGHLY**
 9 **CONFIDENTIAL – ATTORNEYS' EYES ONLY" Information or Items to Dispute**
 10 **Resolution Personnel, Designated House Counsel, Experts or Others.**

11 (a)(1) Unless otherwise ordered by the Court or agreed to in writing by the
 12 Designating Party, a Party that seeks to disclose to any mediator or arbitrator engaged in
 13 the above captioned proceedings any information or item that has been designated
 14 "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" pursuant to paragraph 7.3(b)
 15 first must make a written request to the Designating Party that (1) sets forth the full name
 16 of the mediator or arbitrator and the city and state of his or her residence, (2) attaches a
 17 copy of the mediator's or arbitrator's current resume, (3) identifies the mediator's or
 18 arbitrator's current employer, (4) sets forth an explanation as to why the Party believes
 19 disclosure of the information is reasonably necessary, and (5) provides the Designating
 20 Party with at least three specific dates and/or times upon which the Party seeking to
 21 disclose to the mediator or arbitrator shall be available to meet and confer with the
 22 Designating Party in advance of such disclosure.

23 (a)(2) Unless otherwise ordered by the Court or agreed to in writing by the
 24 Designating Party, a Party that seeks to disclose to Designated House Counsel any
 25 information or item that has been designated "HIGHLY CONFIDENTIAL – ATTORNEYS'
 26 EYES ONLY" pursuant to paragraph 7.3(d) first must make a written request to the
 27 Designating Party that (1) sets forth the full name of the Designated House Counsel and
 28

1 the city and state of his or her residence, and (2) describes the Designated House
 2 Counsel's current and reasonably foreseeable future primary job duties and
 3 responsibilities in sufficient detail to determine if the Designated House Counsel is
 4 involved, or may become involved, in any competitive decision-making. Any Designated
 5 House Counsel who receives "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY"
 6 information pursuant to this Oder must disclose any relevant changes in job duties or
 7 responsibilities within ten (10) business days of such changes or responsibilities to allow
 8 the Designating Party to evaluate any later-arising competitive decision-making
 9 responsibilities.

10 (a)(3) Unless otherwise ordered by the Court or agreed to in writing by the
 11 Designating Party, a Party that seeks to disclose to an Expert (as defined in this
 12 Stipulated Order) any information or item that has been designated "HIGHLY
 13 CONFIDENTIAL – ATTORNEYS' EYES ONLY" pursuant to paragraph 7.3(g) first must
 14 make a written request to the Designating Party that (1) sets forth the full name of the
 15 Expert and the city and state of his or her primary residence, (2) attaches a copy of the
 16 Expert's current resume, (3) identifies the Expert's current employer(s), (4) identifies each
 17 person or entity from whom the Expert has received compensation or funding for work in
 18 his or her areas of expertise or to whom the expert has provided professional services,
 19 including in connection with a litigation, at any time during the preceding five years (if the
 20 Expert believes any of this information is subject to a confidentiality obligation to a third-
 21 party, then the Expert should provide whatever information the Expert believes can be
 22 disclosed without violating any confidentiality agreements, and the Party seeking to
 23 disclose to the Expert shall be available to meet and confer with the Designating Party
 24 regarding any such engagement), and (5) identifies any litigation (by name and number
 25 of the case, filing date, and location of court, if such information is not available to the
 26 Expert, the Expert should provide the nature of the litigation and the identity of the
 27 attorney(s) and/or client(s) that retained the Expert in the matter) in connection with which
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1 the Expert has offered expert testimony, including through a declaration, report, or
2 testimony at a deposition or trial, during the preceding five years.

3 (a)(4) Unless otherwise ordered by the Court or agreed to in writing by the
4 Designating Party, a Party that seeks to disclose to any other person any information or
5 item that has been designated "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY"
6 pursuant to paragraph 7.3(h) first must make a written request to the Designating Party
7 that (1) sets forth the full name of the person to whom the Party wishes to disclose the
8 information and the city and state of his or her residence, (2) attaches a copy of that
9 person's current resume, (3) identifies the person's current employer, (4) sets forth an
10 explanation as to why the Party believes disclosure of the information is reasonably
11 necessary, and (5) provides the Designating Party with at least three specific dates
12 and/or times upon which the Party seeking to disclose to the other person shall be
13 available to meet and confer with the Designating Party in advance of such disclosure.

14 To the extent that "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL –
15 ATTORNEYS' EYES ONLY" information or items may be disclosed to a non-testifying
16 Expert, the Party seeking to disclose such material may do so without disclosure of the
17 identity of the non-testifying Expert as long as the non-testifying Expert is not a current or
18 former officer, director, or employee of a competitor of a Party or anticipated to become
19 one.

20 (b) A Party that makes a request and provides the information specified in
21 the preceding respective paragraphs may disclose the subject Protected Material to the
22 identified mediator, arbitrator, Designated House Counsel, Expert or other person unless,
23 within ten (10) business days of delivering the request, the Party receives a written
24 objection from the Designating Party. Any such objection must set forth in detail the
25 grounds on which it is based.

26 (c) A Party that receives a timely written objection must meet and confer
27 with the Designating Party (in person or over the telephone) to try to resolve the matter
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1 by agreement within seven (7) business days of receipt of the written objection. If no
 2 agreement is reached, the Party seeking to make the disclosure to the mediator,
 3 arbitrator, Designated House Counsel, Expert or other person may file a motion as
 4 provided in Civil Local Rule 7 (and in compliance with Civil Local Rule 79-5 and General
 5 Order 62, if applicable) seeking permission from the Court to do so. Any such motion
 6 must describe the circumstances with specificity, set forth in detail the reasons why the
 7 disclosure to the mediator, arbitrator, Designated House Counsel Expert or other person
 8 is reasonably necessary, assess the risk of harm to the Designating Party that the
 9 disclosure would entail and the risk of harm to the Party seeking such disclosure if the
 10 disclosure is not permitted, and suggest any additional means that could be used to
 11 reduce such risks. In addition, any such motion must be accompanied by a competent
 12 declaration describing the parties' efforts to resolve the matter by agreement (i.e., the
 13 extent and the content of the meet and confer discussions) and setting forth the reasons
 14 advanced by the Designating Party for its refusal to approve the requested disclosure.

15 In any such proceeding, the Party opposing disclosure to the mediator, arbitrator,
 16 Designated House Counsel, Expert or other person shall bear the burden of proving that
 17 the risk of harm that the disclosure would entail (under the safeguards proposed)
 18 outweighs the Receiving Party's need to disclose the Protected Material to the mediator,
 19 arbitrator, Designated House Counsel, Expert or other person.

20 **8. PROTECTED MATERIAL SUBPOENAED OR ORDERED PRODUCED IN** 21 **OTHER LITIGATION**

22 If a Party is served with a subpoena or a court order issued in other litigation that
 23 compels disclosure of any information or items designated in this action as
 24 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" that Party
 25 must:

26 (a) promptly notify in writing the Designating Party. Such notification
 27 shall include a copy of the subpoena or court order;

1 (b) promptly notify in writing the party who caused the subpoena or
 2 order to issue in the other litigation that some or all of the material covered by the
 3 subpoena or order is subject to this Stipulated Order. Such notification shall include a
 4 copy of this Stipulated Protective Order; and

5 (c) cooperate with respect to all reasonable procedures sought to be
 6 pursued by the Designating Party whose Protected Material may be affected.

7 If the Designating Party timely seeks a protective order, the Party served with the
 8 subpoena or court order shall not produce any information designated in this action as
 9 "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" before a
 10 determination by the Court from which the subpoena or order issued, unless the Party
 11 has obtained the Designating Party's permission. The Designating Party shall bear the
 12 burden and expense of seeking protection in that Court of its Protected Material – and
 13 nothing in these provisions should be construed as authorizing or encouraging a
 14 Receiving Party in this action to disobey a lawful directive from another court.

15 **9. A NON-PARTY'S PROTECTED MATERIAL SOUGHT TO BE**
 16 **PRODUCED IN THIS LITIGATION**

17 (a) The terms of this Stipulated Order are applicable to information
 18 produced by a Non-Party in this action and designated as "CONFIDENTIAL" or "HIGHLY
 19 CONFIDENTIAL – ATTORNEYS' EYES ONLY." Such information produced by Non-
 20 Parties in connection with this litigation is protected by the remedies and relief provided
 21 by this Stipulated Order. Nothing in these provisions should be construed as prohibiting a
 22 Non-Party from seeking additional protections.

23 (b) In the event that a Party is required, by a valid discovery request, to
 24 produce a Non-Party's confidential information in its possession, and the Party is subject
 25 to an agreement with the Non-Party not to produce the Non-Party's confidential
 26 information, then the Party shall:

27 (1) promptly notify in writing the Requesting Party and the Non-Party
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1 that some or all of the information requested is subject to a
 2 confidentiality agreement with a Non-Party;

- 3 (2) promptly provide the Non-Party with a copy of the Stipulated
 4 Order in this litigation, the relevant discovery request(s), and a
 5 reasonably specific description of the information requested; and
 6 (3) make the information requested available for inspection by the
 7 Non-Party.

8 (c) If the Non-Party fails to object or seek a protective order from this
 9 Court within ten (10) business days of receiving the notice and accompanying
 10 information, the Receiving Party may produce the Non-Party's confidential information
 11 responsive to the discovery request. If the Non-Party timely seeks a protective order, the
 12 Receiving Party shall not produce any information in its possession or control that is
 13 subject to the confidentiality agreement with the Non-Party before a determination by the
 14 Court. Absent a court order to the contrary, the Non-Party shall bear the burden and
 15 expense of seeking protection in this court of its Protected Material. Nothing in these
 16 provisions should be construed as authorizing or encouraging a Receiving Party in this
 17 action to disobey a lawful directive from another court order restricting disclosure of
 18 confidential material.

19 **10. UNAUTHORIZED DISCLOSURE OF PROTECTED MATERIAL**

20 If a Receiving Party learns that, by inadvertence or otherwise, it has disclosed
 21 Protected Material to any person or in any circumstance not authorized under this
 22 Stipulated Order, the Receiving Party must immediately (a) notify in writing the
 23 Designating Party of the unauthorized disclosures; (b) use its best efforts to retrieve all
 24 unauthorized copies of the Protected Material; (c) inform the person or persons to whom
 25 unauthorized disclosures were made of all the terms of this Stipulated Order; and (d)
 26 request such person or persons to execute the "Acknowledgment and Agreement to Be
 27 Bound" that is attached hereto as Exhibit A.

**11. INADVERTENT PRODUCTION OF PRIVILEGED OR OTHERWISE
PROTECTED MATERIAL**

Inadvertent production of Protected Material without proper designation at the time of production shall not be deemed a waiver of any claim of confidentiality as to such matter. To the extent that material subject to a claim of privilege or other protection is inadvertently produced, the Producing Party shall provide written notice to the Receiving Parties as soon as reasonably possible following the discovery of the inadvertent production specifically identifying the material that was inadvertently produced, the nature of the privilege or other protection and the date of discovery of the inadvertent production. The written notice shall be accompanied by a copy of the Material (marked as "CONFIDENTIAL" Information or Items or " HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY " in compliance with paragraph 5.2 above (and bearing the same production numbers as the previously undesignated material originally produced)) which replace in the Receiving Party's paper and electronic files of the previously undesignated material originally produced. When a Producing Party gives such notice to the Receiving Parties, the obligations of the Receiving Parties are those set forth in Federal Rule of Civil Procedure 26(b)(5)(B) with the exception that the Receiving Parties shall not use the inadvertently produced material to challenge the privilege or other protection.

12. MISCELLANEOUS

12.1 Right to Further Relief.

Nothing in this Stipulated Order abridges the right of any person to: (a) apply to the Court for a further protective order relating to any Protected Material or relating to any discovery in this litigation; or (b) apply to the Court for an order (i) compelling production of documents, (ii) permitting disclosure of Protected Material beyond the scope contemplated by the terms of this Stipulated Order, or (iii) modifying this Stipulated Order in any other manner

12.2 Right to Assert Other Objections.

1 By stipulating to the entry of this Stipulated Order no Party waives any right it
 2 otherwise would have to object to disclosing or producing any information or item on any
 3 ground not addressed in this Stipulated Order. Similarly, no Party waives any right to
 4 object on any ground to use in evidence of any of the material covered by this Stipulated
 5 Order.

6 12.3 Filing Protected Material.

7 Without written permission from the Designating Party or a court order secured
 8 after appropriate notice to all interested persons, a Party may not file in the public record
 9 in this action any Protected Material. A Party intending to file Protected Material under
 10 seal must provide three (3) days notice to the other Party either by facsimile or e-mail.
 11 Shortly after notice is given, the Parties shall meet and confer concerning whether said
 12 material should be filed under seal. If it is determined through the meet and confer
 13 process that it is necessary to file the material under seal, the Party intending to file said
 14 material under seal must comply with Civil Local Rule 79-5 and General Order 62.
 15 Protected Material may only be filed under seal pursuant to a court order authorizing the
 16 sealing of the specific Protected Material at issue. Pursuant to Civil Local Rule 79-5 and
 17 General Order 62, a sealing order will issue only upon a request establishing that the
 18 Protected Material at issue is privileged, protectable as a trade secret, or otherwise
 19 entitled to protection under the law. If a Receiving Party's request to file Protected
 20 Material under seal pursuant to Civil Local Rule 79-5(d) and General Order 62 is denied
 21 by the Court, then the Receiving Party may file the Protected Material in the public record
 22 pursuant to Civil Local Rule 79-5(e) unless otherwise instructed by the Court.

23 13. FINAL DISPOSITION

24 Within 60 days after the final disposition of this action, as defined in Section 4,
 25 each Receiving Party must return all Protected Material to the Producing Party or destroy
 26 such material. As used in this subdivision, "all Protected Material" includes all copies,
 27 abstracts, compilations, summaries, and any other format reproducing or capturing any of
 28

1 the Protected Material. Whether the Protected Material is returned or destroyed, the
2 Receiving Party must submit a written certification to the Producing Party (and, if not the
3 same person or entity, to the Designating Party) by the 60-day deadline that (1) identifies
4 (by category, where appropriate) all the Protected Material that was returned or
5 destroyed and (2) affirms that the Receiving Party has not retained any copies, abstracts,
6 compilations, summaries or any other format reproducing or capturing any of the
7 Protected Material. Notwithstanding this provision, Counsel are entitled to retain an
8 archival copy of all pleadings, motion papers, trial, deposition, and hearing transcripts,
9 legal memoranda, correspondence, deposition and trial exhibits, expert reports, attorney
10 work product, and consultant and expert work product, even if such materials contain
11 Protected Material. Any such archival copies that contain or constitute Protected Material
12 remain subject to this Stipulated Order as set forth in Section 4.

13 **14. EXECUTION OF THE STIPULATED ORDER; COURT'S JURISDICTION.**

14 This Stipulated Order may be signed in counterparts, each of which, taken
15 together, shall be one and the same document. Faxed (or otherwise electronically
16 transmitted) signatures on this Stipulated Order and/or the "Acknowledgment and
17 Agreement to Be Bound" (Exhibit A) shall be deemed binding, as if originals.

18 This Stipulated Order shall become effective as a stipulation among the Parties
19 immediately upon its execution by Counsel for all Parties, notwithstanding the pendency
20 of approval by the Court. If approval by the Court is ultimately withheld, no Receiving
21 Party shall treat any Protected Material produced to them or generated prior to that time
22 other than as provided in this Stipulated Order without giving the Producing Party
23 sufficient advance notice to allow the Producing Party to apply to the Court for additional
24 relief.

25 This Court shall retain jurisdiction over all persons subject to this Stipulated Order
26 for the purposes of enforcing this Stipulated Order.

27 **15. INAPPLICABILITY OF THIS STIPULATED ORDER.**

1 Notwithstanding any of the foregoing, this Stipulated Order shall not apply to the
 2 disclosure of any Protected Material by any Party in response to its receipt from any
 3 governmental entity of a subpoena or other process or order (including but not limited to
 4 a grand jury subpoena) to both (1) produce any such Protected Material in connection
 5 with a criminal or quasi-criminal investigation and (2) maintain the secrecy of both the
 6 request for, and the production of, the Protected Material. Additionally, this Stipulated
 7 Order shall not apply to the disclosure of any Protected Material by any Party to the
 8 extent that a state or federal statute precludes that Party from disclosing the existence of
 9 a subpoena to the Party whose records are sought.

10
 11 **IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.**

12
 13 DATED: March 25, 2013

HANSON BRIDGETT LLP

14
 15 By: /s/ Christopher S. Walters

16 GARNER K. WENG
 17 CHRISTOPHER S. WALTERS
 Attorneys for Plaintiffs
 18 MACY'S, INC. and MACYS.COM, INC.

19 DATED: March 25, 2013

AMSTER, ROTHSTEIN & EBENSTEIN LLP

20
 21 By: /s/ Anthony F. Lo Cicero

22 ANTHONY F. LO CICERO
 23 CHESTER ROTHSTEIN
 24 MARC J. JASON
 JESSICA CAPASSO
 Attorneys for Plaintiffs
 25 MACY'S, INC. and MACYS.COM, INC.

1 DATED: March 25, 2013

KB-ASH LAW GROUP

2
3 By: /s/ Benjamin Ashurov

4 BENJAMIN ASHUROV

Attorneys for Defendant

5 STRATEGIC MARKS, LLC

6 PURSUANT TO STIPULATION, IT IS SO ORDERED.

7 DATED: March 26, 2013



8 The Honorable Samuel Conti
9 United States District Judge

EXHIBIT A

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

I, _____ [print or type full name], of
_____ [print or type full address], declare under penalty of perjury that I
have read in its entirety and understand the Stipulated Protective Order that was issued
by the United States District Court for the Northern District of California on
_____ [date] in the case of Macy's Inc. and Macy's.com, Inc. v. Strategic
Marks, LLC., U.S. District Court for the Northern District of California, Case No. 11-CV-
06198-SC. I agree to comply with and to be bound by all the terms of the Stipulated
Protective Order and I understand and acknowledge that failure to so comply could
expose me to sanctions and punishment in the nature of contempt. I solemnly promise
that I will not disclose in any manner any information or item that is subject to this
Stipulated Protective Order to any person or entity except in strict compliance with the
provisions of this Stipulated Protective Order.

I further agree to submit to the jurisdiction of the United States District Court for
the Northern District of California for the purpose of enforcing the terms of this Stipulated
Protective Order, even if such enforcement proceedings occur after termination of this
action.

Date: _____

City and State where sworn and signed: _____

Printed name: _____
[printed name]

Signature: _____
[signature]